86-862

Supreme Court, U.S.
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CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

KARL POTTS, ET AL., PETITIONERS

v.

MAGGIE BELL HEATHCOAT, ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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30pp

QUESTION PRESENTED

Whether the immunity recognized in *Barr* v. *Matteo*, 360 U.S. 564 (1959), protects petitioners—federal employees sued in their individual capacities—from liability under state tort law for injuries allegedly caused by their official acts.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Charles Davis, Robert D. Mitchell, Ray Montgomery, Herbert Plyler, Kenneth Rhoden, and William Clyde Snoddy are defendants in the district court and petitioners in this Court.

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MAGGIE BELL HEATHCOAT, ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of Karl Potts, Charles Davis, Robert D. Mitchell, Ray Montgomery, Herbert Plyler, Kenneth Rhoden, and William Clyde Snoddy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 790 F.2d 1540. The order of the court of appeals granting permission to appeal pursuant to 28 U.S.C. 1292(b) (App., *infra*, 11a) is unreported. The orders of the district court (App., *infra*, 12a-13a, 14a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 16a-17a) was entered on June 10, 1986. A petition for rehearing was denied on August 28, 1986 (App., *infra*, 18a-19a). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. This is a common law tort action, which was initiated in state court and removed to federal court by petitioners, all of whom are federal employees. Respondent seeks monetary damages for injuries allegedly caused by conduct that was within the scope of petitioners' official duties. Leonard Heathcoat, respondent's decedent, was employed by the Tennessee Valley Authority (TVA); his duties included dismantling a phosphorus furnace building at TVA's National Fertilizer Center in Muscle Shoals, Alabama. App., *infra*, 2a; Wood Affidavit, dated October 18, 1984, at 1-2.

Petitioners are TVA employees "[e]ach of [whom] was in some fashion a supervisor of the removal operations" being performed by Leonard Heathcoat (App., *infra*, 5a). Thus, petitioner Karl Potts was the chief of the maintenance branch of the Office of Agricultural and Chemical Development (OACD)—the component of the TVA that operates the Muscle Shoals facility—and was responsible for planning and supervising all maintenance functions for that component of the TVA; Kenneth Rhoden was the assistant chief of the maintenance branch and served as Potts' deputy; William Clyde Snoddy was the general foreman of the maintenance branch, charged with supervising the activities of more than 200 employees; Charles Davis was an assistant manager of the

OACD and director of the division of chemical development with responsibility for planning and administering the TVA's entire chemical research and engineering program; Robert Mitchell was an assistant director of the OACD and assisted the director of chemical development in the overall planning of the work of the chemical development division; Ray Montgomery was a hazard control specialist charged with planning and coordinating safety programs for the OACD; and Herbert Plyler was a safety specialist with similar responsibilities.[1]

On the morning of September 16, 1983, Leonard Heathcoat was using a torch to cut the steel supports below the roof of the phosphorus furnace building. That afternoon "[h]e went upon the roof to help pry loose concrete slabs, and pried up one or two slabs, but the next slab collapsed beneath him and he fell approximately 50 feet to his death." App., *infra*, 2a; Wood Affidavit, dated October 18, 1984, at 1-2.

Respondent subsequently commenced this action against petitioners in Alabama state court. She alleged that petitioners "had the duty to provide [Leonard Heathcoat] a safe place to work and/or a reasonably safe work environment" and that petitioners "negligently or wantonly breached this duty." Complaint at 2. Respondent demanded damages in the amount of $1 million (*id.* at 4-5).

Petitioners removed the action to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. 1442(a)(1); they filed a motion to dismiss or, in the alternative, for summary judgment on the grounds that (1) they

[1] This discussion of petitioners' duties is based upon the job descriptions that are included in the summary judgment record (see App., *infra*, 5a).

were absolutely immune from suit under *Barr* v. *Matteo*, 360 U.S. 564 (1959); (2) the release in the personal service contract entered into by respondent's decedent bars respondent's claim for damages; and (3) respondent's damages claim is barred by the exclusive remedy provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8116(c).[2]

The district court denied the motion without opinion (App., *infra*, 12a-13a). It subsequently granted petitioners' motion to certify the contract and FECA issues for interlocutory appeal pursuant to 28 U.S.C. 1292(b) (App., *infra*, 14a-15a).

2. The court of appeals affirmed (App., *infra*, 1a-10a). The court concluded with respect to the immunity issue that "the governing principle is clear: a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty. 'Discretionary acts' involve planning or policy considerations and do not concern day to day operations" (*id.* at 4a (emphasis in original; citations omitted)).

The court noted that petitioners each were "in some fashion a supervisor of the removal operations being conducted by TVA's Office of Agricultural and Chemical Development" (App., *infra*, 5a). It observed that the summary judgment record contained petitioners' job descriptions and answers to respondent's interrogatories, but characterized the job descriptions as "detailed but abstract" and the interrogatory responses as "defensive and unilluminating" (*ibid.*). It concluded that the district court properly denied petitioners' motion for summary judgment,

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[2] Respondent is receiving benefits under FECA as a result of the death of Leonard Heathcoat (Hester Affidavit, dated October 16, 1984, at 1-2).

observing that "whether, on a fuller development of the facts, an immunity defense might prove meritorious is for the district court" (*id.* at 6a).[3]

REASONS FOR GRANTING THE PETITION

The question presented in this case is the same as the question presented in *Westfall* v. *Erwin*, petition for cert. pending, No. 86-714, *i.e.*, whether a federal employee is subject to personal liability under state tort law for his official acts.[4] The court of appeals in the present case concluded that petitioners were not entitled to immunity from tort liability because "a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty" (App., *infra*, 4a (emphasis in original)), the same rule that was applied by the court of appeals in *Westfall*. As we argued in our petition in *Westfall* (at 9-18), this narrow application of immunity doctrine is inconsistent with the reasoning in *Barr* v. *Matteo*, 360 U.S. 564 (1959). We submit that a federal employee is entitled to immunity from liability under state tort law as long as he acts within the scope of his official duties.[5]

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[3] The court of appeals also rejected petitioners' arguments that respondent's claim is barred by the Federal Employees' Compensation Act and the release clause in the employment contract entered into by respondent's decedent (App., *infra*, 6a-10a).

[4] We have served counsel for respondent with a copy of the petition in *Westfall*.

[5] Since petitioners and respondent's decedent all were federal employees, and respondent's claim relates to their common workplace, immunity would be appropriate here if the

In addition, petitioners here, like the petitioners in *Westfall* (see 86-714 Pet. 18-20), would be immune from tort liability even if this Court were to determine that immunity is limited to federal employees who exercise discretion. Petitioners' planning, supervisory, and safety duties plainly require them to make a variety of sensitive judgments in determining whether to undertake particular projects and evaluating the effects of those projects upon the safety of the workplace. Even if the exercise of discretion is a necessary prerequisite to a federal employee's absolute immunity from common law torts, therefore, petitioners should be afforded immunity so that their exercise of discretion will not be affected by the fear of potential personal liability.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in view of the disposition of the petition in *Westfall* v. *Erwin*, No. 86-714.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LEWIS E. WALLACE
Acting General Counsel
Tennessee Valley Authority

NOVEMBER 1986

Court adopts an immunity rule that applies to common law law tort actions brought by one federal employee against a fellow employee (see 86-714 Pet. 18 n.17).

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7805, 85-7288

MAGGIE BELL HEATHCOAT, AS ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT, DECEASED, PLAINTIFF-APPELLEE

v.

KARL POTTS, ET AL., DEFENDANT-APPELLANTS

Appeals from the United States District Court
for the Northern District of Alabama

June 10, 1986

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

GODBOLD, Chief Judge:

These consolidated appeals arise from the death of Leonard Heathcoat while he was employed by TVA in Muscle Shoals, Alabama under a personal services contract for temporary work.

Heathcoat was working on the dismantling of a building at TVA's National Fertilizer Development Center. His job was to cut steel supports below the roof as part of the effort to remove the roof. He went upon the roof to help pry loose concrete slabs, and pried up one or two slabs, but the next slab collapsed beneath him and he fell approximately 50 feet to his death.

Plaintiff, the widow as administratrix, filed this wrongful death action, pursuant to Alabama law, in state court, against seven supervisors and staff specialists of TVA, seeking damages. The case was removed to the district court.

Plaintiff alleged that the defendants failed to provide her husband a safe place and environment in which to work and did not properly control the conditions, methods, and manner in which work was performed. The defendants answered and moved for summary judgment on the grounds that (1) they were federal supervisory employees exercising discretionary functions and acting within the outer perimeters of their lines of duty and thus are absolutely immune from this state tort action; (2) plaintiff's claim is barred by the release contained in Heathcoat's personal services contract with TVA; and (3) the action is barred by the exclusive remedy provisions of FECA, 5 U.S.C. § 8116(c) (1982), because the defendants were acting as alter egos or instrumentalities of TVA in fulfilling duties that TVA owed Mr. Heathcoat.

Following discovery, plaintiff responded to defendants' motion for summary judgment. The district court, without a hearing, denied defendants' motion without any statement of reasons.

Defendants filed a timely notice of appeal from the district court's order pursuant to 28 U.S.C. § 1291,

on the ground that the denial of official immunity was appealable under the collateral order doctrine. This became case No. 84-7805. Contemporaneously defendants moved the court to certify under 28 U.S.C. § 1292(b) the two remaining questions presented by their motion for summary judgment. The district court granted the motion, this court granted permission to appeal, and this appeal became case No. 85-7288. The two appeals were consolidated.

A number of cases have permitted collateral order appeals from denial of a claim of absolute immunity. *See Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984); *Chavez v. Singer*, 698 F.2d 420 (10th Cir. 1983); *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979). Heathcoat contends that this case is not within *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) because it does not present a serious and unsettled question. We hold that *Cohen* applies. The unsettled nature of a serious question is demonstrated by events in this court that followed the taking of the instant appeal.

In March 1985 we held in *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985) that defendant TVA employees enjoyed absolute immunity for ordinary torts committed within the scope of their jobs unless the tort alleged was of constitutional magnitude. On August 26, 1985 the court withdrew its March opinion and entered another opinion. On petition for rehearing and rehearing en banc, on November 12, 1985, the court deleted part C of the August 26 opinion and substituted a new part C, covering the immunity issue. The August 26 opinion,

as amended by the opinion of November 12, appears at 769 F.2d 724 (11th Cir. 1985).

Intervening in these events, a different panel handed down for the court on November 4, 1985, *Franks v. Bolden*, 774 F.2d 1552 (11th Cir.), *reh'g en banc denied*, 781 F.2d 905 (1985), holding that official immunity did not extend to acts performed by TVA employee-defendants concerning day to day operations and not involving planning or policy consideration. Despite the later issue date of the opinion, *Franks* cites to the November 12 amended opinion entered in *Johns*.

Also to be considered is *Hendrix v. Patterson*, 776 F.2d 1056 (11th Cir.) (order without opinion), *reh'g en banc denied*, 779 F.2d 60 (1985), an unpublished opinion issued October 24, 1985 and handed down for the court by the same panel that decided *Franks*. Citing both *Franks* and the November 12 opinion in *Johns*, it holds summarily that the acts of the TVA defendants at issue were operational in nature and involved no governmental policy or planning concerns, thus official immunity was not available.

Despite this confusing sequence of events the governing principle is clear: a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty. *Johns*, 769 F.2d at 728. "Discretionary acts" involve planning or policy considerations and do not concern day to day operations. *Franks*, 774 F.2d at 1555.

In *Johns* the district court granted summary judgment to the defendants on the ground that plaintiff's decedent was an invitee on TVA property and the individual TVA defendants had no duty to warn invitees of the hazard involved. On appeal the TVA

defendants asserted immunity as an alternative ground supporting the summary judgment, although the issue had not been mentioned by the court in granting summary judgment. This court declined to reach the issue under these circumstances and remanded it to the district court to deal with it. In *Franks* the district court had conducted a hearing on the immunity issue, and the case had been tried before a jury with a verdict for plaintiffs. Thus the issue was before the court of appeals on a full record, and this court held, construing all the evidence in the light most favorable to the TVA defendants, that there was no way in which the acts in question could be termed anything but operational. 774 F.2d at 1555 n.3. *Hendrix* also had been tried to a jury which returned a verdict for plaintiffs. Presumably, as in *Franks*, there was a full record for this court to consider.

In this case the seven individual defendants are: Karl Potts, chief maintenance branch, division of chemical operations; Clyde Snoddy, general foreman; Ray Montgomery, hazard control specialist; Charles Davis, assistant office manager; Kenneth Rhoden, assistant branch chief, maintenance branch; Robert Mitchell, assistant director, division of chemical development; and Herbert Plyler, safety specialist.

Each of these defendants was in some fashion a supervisor of the removal operations being conducted by TVA's Office of Agricultural and Chemical Development. The summary judgment record contains job descriptions for each of the defendants and the defendants' answers to interrogatories propounded by the plaintiff. The job descriptions are detailed but abstract. The responses to the plaintiff's interrogatories are defensive and unilluminating. On this record we find no error in the denial of summary

judgment on immunity grounds; whether, on a fuller development of the facts, an immunity defense might prove meritorious is for the district court.

FECA bar

Plaintiff made a claim for her husband's death under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193. The defendants contend that the exclusive remedy provision of FECA, 5 U.S.C. § 8116(c), bars this suit.[1] FECA is silent on the matter of co-employee suits. The FECA provides that if the United States and its "instrumentalities" are liable under its provisions, recovery under this act is the employee's exclusive remedy against these parties. 5 U.S.C. § 8116(c) (1982). In *Allman v. Hanley*, 302 F.2d 559, 563 (5th Cir. 1962), this court held that this provision does not bar suits by co-employees. The Sixth Circuit in *Bates v. Harp*, 573 F.2d 930, 935 (6th Cir. 1978), adopted the Fifth Circuit approach. Defendants try to distinguish these cases on two grounds. First, they argue that these cases only decided the issue of whether the statute created a per se bar to suits against co-employees and therefore courts are free to determine on a case by case basis whether a particular co-employee is an "instrumentality." This distinction fails because the courts in *Allman* and *Bates* held that absent specific language the statute should not be construed to abrogate the common law right to sue a co-employee.

Defendants also attempt to avoid the bite of *Allman* by arguing that the court in *Allman* ruled that

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[1] The court in *Franks* declined to address this issue because it had not been presented to the district court. 774 F.2d at 1554 n.2.

this statute should be construed in accordance with the law in the majority of the states and that since the decision in *Allman* the majority of states have adopted a contrary rule. This argument fails for two reasons. First, the *Allman* court did not establish such a rule; it only looked to the law of the majority of states to determine what the common law was so that it could apply the canon of statutory construction that a court will assume that Congress changed the existing law when the statute shows a clear manifestation of intent on the part of Congress to do so. Second, defendants' proposed rule would allow states to change the contours of established federal law where there is no indication that Congress had any intention of delegating such power to the states. As just noted, the court in *Allman* only looked to the common law of the states to determine the context in which Congress acted; it did not decide that state law controls interpretation of federal law.

Defendants' final contention is that this suit is barred because the Alabama Supreme Court in *Slagle v. Parker*, 370 So.2d 947 (Ala.1979), held that provisions of the Workmen's Compensation Act immunized co-employees from wrongful death suits. *See* Ala.Code 25-5-11. There is no indication that the TVA is covered by the Alabama Workmen's Compensation Act. The fact that the Alabama legislature has relieved employees of participating employers from certain liabilities does not imply that they wished to relieve employees of the federal government of the same liability. In the first situation, the relief is part of one compensation scheme enacted by the state; the second situation would involve applying part of that scheme to an unrelated compensation scheme.

Waiver

As we have pointed out Heathcoat was covered by FECA and payments are being made to plaintiff pursuant to its terms. The defendants' waiver argument is based upon paragraph 6 of the contract under which Heathcoat was employed, which provided:

> 6. In the event that Contractor sustains personal injuries in the course of and arising out of the performance of services or travel under this contract and such injuries do not fall within the coverage of the Federal Employees' Compensation Act, TVA agrees to pay the injured party such medical expenses as in the opinion of TVA's Medical Director may be necessary as a part of proper and adequate treatment for such injuries. In consideration of such agreement by TVA, Contractor hereby waives any claim, demand, action, or cause of action that Contractor may have against the United States, TVA, its agents, employees, or Contractors arising out of, resulting from, or in any way connected with such personal injuries. Contractor agrees to observe all safety rules required by TVA.

This waiver is "in consideration of TVA's effort to protect the contractor *if he was not adequately protected under FECA.*" (emphasis supplied). This extension of coverage by TVA (its "effort") fills a hole in the contractor's protection by affording supplemental compensation-type benefits for non-FECA claims.

For its part, by the first sentence of paragraph 6, TVA agrees to pay medical expenses for such a non-FECA injury. Thus: If a "contractor sustains personal injuries . . . and such injuries do not fall

within the coverage of [FECA]. . . ." then TVA agrees to pay "such medical expenses" as sustained for treatment "for such injuries."

In consideration of TVA's undertaking, the second sentence of paragraph 6, the contractor waives claims "arising out of, resulting from, or in any way connected with *such injuries*." The "such injuries" the claims for which the contractor gives up by the second sentence are the same "such injuries" that TVA agrees to become responsible for by the first sentence, that is, *claims falling outside of FECA*. The contractor gets the added protection of compensation-type benefits for injuries not falling within the applicable compensation act, and he waives his right to sue for the injuries included within this additional coverage. This is a square trade-off. It is the historical trade-off where compensation-type benefits are provided.

Defendants contend that Heathcoat waived any cause of action for injuries arising out of the performance of services under his contract. This bar to the whole universe of injuries would assign to "such personal injuries", in the second sentence, a meaning that sweeps much more broadly than the "such injuries", "such medical expenses," and "such injuries" as they appear in the first sentence. This reading is not supported by the language of paragraph 6 itself or anything else in the record. It is an implausible reading of paragraph 6 and an implausible trade-off as well.

The proof of the pudding—that the "such personal injuries" that are waived in the second sentence do not mean the whole universe of injuries sustained under a contract with TVA—is that such a waiver would bar Heathcoat's FECA claim. It would be a

useless act for TVA to extract a waiver for a claim covered by FECA, which contains its own exclusive remedy clause (which TVA asserts as a bar). And, if the defendants' argument were correct, the FECA benefits that TVA is currently paying to plaintiff's estate are being paid even though they were waived by paragraph 6. Thus defendants' interpretation is inconsistent with TVA's own interpretation of paragraph 6.

The overall scheme is straightforward, clear and simple:

> (1) Injuries under FECA are covered by FECA itself, which contains its own limitations on right to sue.
>
> (2) TVA has supplemented FECA by agreeing to pay medical expenses for non-FECA injuries.
>
> (3) The contractor has waived his right to sue on non-FECA claims falling within the supplementary coverage.

Applying the scheme to this case, the paragraph 6 waiver has no application to this claim for damages which is for injuries that fall within the coverage of FECA.

AFFIRMED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-2000

KARL POTTS, KENNETH RHODEN, CLYDE SNODDY, RAY MONTGOMERY, HERBERT PLYLER, CHARLES DAVIS and ROBERT D. MITCHELL, PETITIONERS

versus

MAGGIE BELL HEATHCOAT, Administratrix for the Estate of LEONARD JAMES HEATHCOAT, Deceased, RESPONDENT

On Application for Leave to Appeal
from an Interlocutory Order

[Filed Apr. 30, 1985]

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is GRANTED. The clerk shall consolidate with No. 84-7805.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV84-AR-1676-S

MAGGIE BELL HEATHCOAT, as Administratrix for the Estate of Leonard James Heathcoat, PLAINTIFF

v.

KARL POTTS, ET AL., DEFENDANTS

[Filed Oct. 22, 1984]
[Denied Dec. 10, 1984]

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS POTTS, RHODEN, SNODDY, MONTGOMERY, DAVIS, MITCHELL, AND PLYLER

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants Potts, Rhoden, Snoddy, Montgomery, Davis, Mitchell, and Plyler respectfully move the Court for judgment in their favor dismissing this action against them with prejudice on the grounds that the pleadings, answers to interrogatories, and other papers on file, together with the affidavits of Talmadge Wood and H. D. Hester filed herewith, establish the following defenses as a matter of law:

1. Plaintiff's claims against these defendants are barred by the release in plaintiff's decedent's personal

services contract with Tennessee Valley Authority (TVA).

2. Plaintiff's claim is barred by the exclusive remedy provisions of the Federal Employees' Compensation Act because at all relevant times the defendants were acting as alter egos or instrumentalities of TVA in fulfilling duties which TVA owed plaintiff's decedent.

3. At all relevant times the defendants were Federal employees exercising discretionary functions and acting within the outer perimeters of their lines of duty and thus are absolutely immune under the official immunity doctrine from this tort action.

Respectfully submitted,

/s/ Herbert S. Sanger, Jr.
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JAMES E. FOX
Associate General Counsel

/s/ Robert C. Glinski
ROBERT C. GLINSKI

/s/ Ralph E. Rodgers
RALPH E. RODGERS
Attorneys for Defendants
Potts, Rhoden, Snoddy,
Montgomery, Davis,
Mitchell, and Plyler

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 84-AR-1676-S

MAGGIE BELL HEATHCOAT, Administratrix for the Estate of Leonard James Heathcoat, PLAINTIFF

vs.

KARL POTTS, ET AL., DEFENDANTS

[Filed Dec. 28, 1984]

ORDER

Defendants Potts, Rhoden, Snoddy, Montgomery, Davis, Mitchell and Plyler, pursuant to 28 U.S.C. § 1292(b), have requested this court to certify two questions for appeal which would not otherwise be appealable. Because an appeal as to one issue has already been taken by defendants as a matter of right, and because the court agrees with defendants that the other issues upon which they wish to appeal involve controlling questions of law, any one of which would be dispositive of the case if they are correct, and because there is substantial ground for difference of opinion so that an immediate appeal from the or-

der of December 10, 1984, as to the additional issues may materially advance the ultimate determination of the litigation, the court hereby STAYS the proceedings in the district court and CERTIFIES to the Court of Appeals for the Eleventh Circuit the following questions:

1. Whether the release contained in Leonard Heathcoat's personal service contract bars plaintiff's recovery in this action.

2. Whether plaintiff's action is barred by the alleged exclusive remedy provision of the Federal Employees' Compensation Act (5 U.S.C. § 8116 (c)).

DONE this 28th day of December, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-7805 & 85-7288

D.C. Docket Nos. 84-1676 & 84-1676

MAGGIE BELL HEATHCOAT, as Administratrix of the Estate of LEONARD JAMES HEATHCOAT, Deceased, PLAINTIFF-APPELLEE

versus

KARL POTTS, ET AL., DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Northern District of Alabama

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the

judgment of the said District Court in these causes be and the same are hereby, AFFIRMED; and these causes be and the same are hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 10, 1986

For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: SEP. 5, 1986

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7805 and 85-7288

MAGGIE BELL HEATHCOAT, ad Administratrix for the Estate of LEONARD JAMES HEATHCOAT, Deceased,
PLAINTIFF-APPELLEE

versus

KARL POTTS, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Northern District of Alabama

[Filed Aug. 28, 1986]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold
Chief Judge

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